IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the United States and is a principal spokesman for the American business community. The Chamber of

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

Commerce has a direct membership of over 3,700 state and local chambers of commerce and professional and trade associations, and a business membership in excess of 86,000 business firms and individuals.

In order to represent its members' views on questions of importance to their vital interests, and to provide such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases concerning the interpretation of the Occupational Safety and Health Act of 1970.[2]

The issue presented in this case, whether the Secretary of Labor is authorized to promulgate a regulation, which, by his own admission, is suggested neither by the statute itself nor its legislative history, granting to employees a new right to refuse to work based on a subjective belief that a hazardous condition exists, is of significant interest to members of the Chamber for several reasons. First, affirmance of the regulation would signify a broad expansion of the specific rights and duties contained in the statute which are designed to assure that swift but orderly and objective procedures are followed in situations to which the regulation is addressed. In lieu of this carefully worked out statutory scheme the regulation, because of its inherent subjectivity, raises the potential for conflict and confrontation which is at odds not only with the purpose of the statute itself, but with the overall labor-management relations policy as set forth in the National Labor Relations Act, and as interpreted by this Court.

Equally important to members of the Chamber is the proposition, advanced by the lower court and the media, that the regulation is necessary to eliminate the Hobson's

[2] See, e.g., *Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978); *Marshall* v. *American Petroleum Institute, et al.* No. 78-1036 (pending).

choice between jobs and safety. This hyperbolic assessment of the impact of the regulation is unfortunate and untrue. It is unfortunate because it tends to obscure the merits of the arguments advanced in favor of and against the regulation, and because it gives credence to the unfounded premise that employers operate in callous disregard for the safety of their employees; a premise Congress specifically rejected. It is untrue because, in reality, employees are never faced with such a choice. Indeed, the statute's explicit provisions and the Secretary's procedures for implementing them protect employees who believe they are in danger and who then exercise their express right to request a special investigation by the Secretary of the allegedly hazardous condition, and assure that the matter will be handled expeditiously yet orderly. Accordingly, the Secretary's regulation is unwarranted and its negative impact on labor-management relations unnecessary to carry out the purposes of the statute.

For these reasons, the Chamber respectfully submits this brief in support of Petitioner's contention that the decision below be reversed.

QUESTION PRESENTED

Whether the lower court erroneously concluded that the Occupational Safety and Health Act of 1970, by implication, authorizes the Secretary to promulgate a regulation granting to employees a new right to refuse to work based on the employee's own subjective determination that he or she would be exposed to an immediate danger, without resort to the expressly established statutory procedure for dealing with such situations.

SUMMARY OF THE ARGUMENT

I.

The determination of whether a statute contains by implication what it does not expressly contain requires an analytical method which closely examines the scheme of the statute, its legislative history, and the effect a finding of an implied right would have on the system established by Congress to accomplish the purpose of the statute. Applying this methodology to the issue herein presented leads to the inescapable conclusion that the court below erred in implying the right sought by the Secretary. The statute itself is internally cohesive, providing for numerous express rights exercisable by employees to assure their participation in its enforcement. With respect to conditions constituting imminent dangers, the Act specifically grants to employees the right to trigger a special inspection, grants to the Secretary the power to go to court to seek relief, and reposes in the courts the exclusive authority to determine, in fact, that such a condition exists and to suspend all or part of an employer's operation. Under well recognized principles of statutory construction, the affirmative description of a particular power or remedy in legislation implies denial of a non-described power, and precludes the expansion of the coverage of the statute to subsume other remedies unless clear evidence of legislative intent demonstrates a contrary result. *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1942); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974). Thus, mere consistency with the statute's general policy is an insufficient basis upon which to sustain this regulation. See, *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153, 1161 (C.A.D.C. 1975).

The legislative history of the statute, rather than demonstrating a contrary intent to imply the right created

by the Secretary, provides both explicit and implicit indications of an intent to deny employees that right. Congress explicitly rejected giving employees any right to walk off the job with pay, and implicitly rejected any right to self-help by enacting the closely linked request for inspection and imminent danger provisions as an alternative to this right. Moreover, the steady movement of Congress away from giving one person, the inspector in the field, the power to suspend operations to finally giving such power only to federal courts, implies rejection of the idea that any other person should have this power. In short, clear evidence of legislative intent stands in the way of the lower court's implied right theory, and its attempt to dismiss this history as irrelevant is misplaced. Indeed, the lower court overlooked a recent amendment by the Secretary of his interpretation of the anti-discrimination provision, which provides that failure by employers to pay employees for non-work time spent in the exercise of their right to participate in an inspection constitutes discrimination under the Act. Applying the rationale behind this interpretation to the implied right in question demonstrates the fallacy in the lower court's conclusion that an employee who exercises this implied right must be prepared to forego pay, and establishes the fact that the decision below sets up the so-called "strike with pay" provision that Congress expressly rejected.

Finally, it is evident that the implication of an employee right to walk off the job upon only his or her own belief in the existence of a danger would frustrate the specific purpose of the statute, that orderly and objective procedures be followed to determine the actual existence of danger, and thereupon to invoke all appropriate federal judicial powers to protect employees. Moreover, the implication of such a right would impede the general purpose of encouraging industrial stability by leading to end-

less disputes in federal court over all the subjective criteria employed in the regulation to determine whether such walkouts are justified. Such results are unnecessary for the Act and the Secretary's procedures assure ample protection for employees.

II.

The Secretary's regulation improperly intrudes into the national labor relations policy favoring collective bargaining. Specifically, the regulation alters the rights and remedies involved in the enforcement of no-strike—no-lockout, and binding arbitration clauses in such agreements.

ARGUMENT

I. THE RIGHT CREATED BY THE SECRETARY IS NOT SUPPCRTED BY THE LANGUAGE OF THE ACT OR ITS LEGISLATIVE HISTORY AND CANNOT BE RECONCILED WITH THE STATUTORY SCHEME.

A. The Right Created by the Secretary Cannot Be Found Within the Four Corners of the Act Which Expressly Creates Numerous Employee Rights and Remedies Including Those Applicable to Imminent Danger Situations.

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (hereinafter the Act) is a carefully drafted, interwoven series of interdependent provisions designed to accomplish the Congressional purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. § 651(b). To effectuate this broad purpose the Act provides for numerous rights, duties and responsibilities on those parties encompassed by the Act; employers, employees and the Secretary of Labor.

Employers have the final and exclusive responsibility to assure that they are providing a safe and healthful workplace. Thus, the Act imposes upon the employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm",[3] and to comply with occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654(a)(1), (2). Employers who violate their compliance duty face liability in the form of monetary penalties which are potentially severe. 29 U.S.C. § 666(a)-(e). Of particular pertinence here is the fact that an employer who commits a "willful" violation of the Act may be assessed a penalty of $10,000, 29 U.S.C. § 666(a), and if such a violation results in death an employer faces possible imprisonment. 29 U.S.C. § 666(e).[4]

The primary responsibility of the Secretary of Labor (hereafter the Secretary) under the statutory scheme is to enforce the provisions of the Act to assure that employers are complying with its mandates. Thus, in addition to his power to promulgate mandatory safety and health standards (29 U.S.C. § 655) the Secretary is authorized to inspect every workplace covered by the Act and, if he finds a violation, to prosecute employers and bring about expeditious abatement of the condition. 29 U.S.C. §§ 657(a); 658(a), 659. With respect to condi-

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[3] This is the "general duty" provision which has been interpreted to include hazards detectable by mechanical devices, the human senses, and those of which an employer had actual knowledge. See, *American Zinc and Refining Co.* v. *OSHRC*, 501 F.2d 504 (C.A. 8 1974); *Brennan* v. *OSHRC*, 501 F.2d 1196 (C.A. 7 1974).

[4] The term "willful" is not defined by the Act but has been construed to mean an action done voluntarily, with either an intentional disregard of, or plain indifference to the Act's requirements. See, *Intercounty Construction Co.* v. *OSHRC*, 522 F.2d 777, 779-80 (C.A. 4 1975); *Georgia Electric Co.* v. *Marshall*, 595 F.2d 309, 318-19 (C.A. 5 1979).

tions that the Secretary believes constitute imminent dangers, the Act provides (29 U.S.C. § 662(a)):

> The United States district courts shall have jurisdiction, *upon petition of the Secretary*, to restrain any conditions or practices in any place of employment which are such that a danger exists which *could reasonably be expected to cause death or serious physical harm immediately* or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger *and prohibit the employment or presence of any individual in locations or conditions where such imminent danger exists*, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, *or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.* (Emphasis added).

Employees have a duty to comply with safety regulations, 29 U.S.C. § 654(b), but ". . . Congress did not intend to confer on the Secretary or the Commission the power to sanction employees. . . . It seems clear that this enforcement scheme is directed only at employers." *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC*, 534 F.2d 541, 553 (C.A. 3 1976). However, it is clear that Congress intended for employees to play an integral role in the Act's overall scheme, both as intermediaries between employers and the Secretary to assure that each is carrying out their respective duties, and as parties in situations affecting their vital interests. To effectuate this purpose, Congress granted to employees a number of express rights, covering all contingencies, designed to involve

the employees in all aspects of the Act's provisions. Moreover, to insure that employees are protected in the exercise of such rights, Congress enacted an anti-discrimination provision, the implications of which are at issue in this case, providing as follows (29 U.S.C. § 660(c)(1)):

> *No person shall discharge* or in any manner discriminate against *any employee* because such employee has filed any complaint *or instituted or caused to be instituted any proceeding under or related to this Act* or has testified or is about to testify in any such proceeding or *because of the exercise by such employee* on behalf of himself or others *of any right afforded by this Act.* (Emphasis added).

The broad array of rights encompassed by this provision are impressive, and include the following:

> —with respect to applications filed by employers seeking a variance from a standard, the right to receive notice of such application; the right to petition for a hearing on such application; the right to participate in such hearings, and the right to apply for modification or revocation of any order granting the variance application (29 U.S.C. §§ 655(b)(6)(A), (B) 655(d));
>
> —the right to challenge in the courts of appeal the validity of any standard promulgated by the Secretary (29 U.S.C. § 655(f));
>
> —the right to be advised, through prominent posting, of citations issued to the employer alleging a violation of the Act (29 U.S.C. § 658(b));
>
> —the right to contest the reasonableness of any abatement period set by the Secretary for the correction of the violation (29 U.S.C. § 659(c));
>
> —the right to accompany an inspector and the right to consult privately with the inspector during inspections (29 U.S.C. §§ 657(a)(2), 657(e));

—the right to participate as parties in hearings on citations issued their employer (29 U.S.C. § 659(c));

—the right to petition the courts of appeal to review final orders determining the validity of citations issued to their employers (29 U.S.C. § 660(a)).

Although none of the foregoing rights expressly created in the Act are specifically referred to in the anti-discrimination provision, 29 U.S.C. § 660(c)(1), it is beyond dispute that such rights fall within the scope of that section's protection against discrimination because of the exercise of "any right afforded by this Act."[5] These are by no means the only rights which employees may exercise. The Act specifically creates other rights which are intimately related to the Act's request for inspection and imminent danger provisions. This cohesive scheme of additional rights is embraced by the protection which the anti-discrimination provision affords the employee who "has filed any complaint or instituted . . . any proceeding under or related to this Act," and involves employees in the process of detecting, reporting and correcting potential violations of the Act including imminent dangers. Moreover, in creating this cohesive scheme of rights, the Act enumerates in detail the steps employees are to take when they believe that such conditions exist in the workplace, be they ordinary violations or imminent dangers.

Thus, with regard to the employee right, exercisable at any time, to notify inspectors of violations believed to exist in the workplace, the Act provides (29 U.S.C. § 657(f)(2)):

> Prior to or during any inspection of a workplace, any employees or representatives of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace . . . .

[5] This section itself creates a right of an employee to be secure against discharge or discrimination because he or she "has testified or is about to testify" in any proceeding under the Act.

With regard to the employee right, exercisable at any time, to request a special inspection if it is believed that an imminent danger exists, the Act provides (29 U.S.C. § 657(f)(1)):

> Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representatives of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

This request for inspection provision flows logically into the "imminent danger" provision, 29 U.S.C. § 662(a), *supra*, which empowers the Secretary to petition the courts for an order restraining such conditions, and em-

powers the courts to grant any appropriate relief, including the withdrawal of employees and the cessation of all or part of a business operation.

As the foregoing enumeration of the rights created in the Act makes clear, an employee has specified rights, protected by the anti-discrimination provision, which he or she may exercise *at any time* there is a belief that violations exist at the workplace which threaten physical harm or imminent danger. If at any time an employee believes such violations exist, he or she has the right to request a special inspection by the Secretary and the right to be informed quickly of the Secretary's determination of whether to invoke the power of the federal courts to remedy the situation including, if necessary, the power to order withdrawal of employees and shut down operations.[6] Indeed, the employee has the express right to bring his or her own action in federal courts to compel the Secretary to take action where it is believed that the Secretary's failure to seek a court order is unjustified. 29 U.S.C. § 662(d).

It is against this statutory scheme that the decision to create an implied right must be tested. Significantly, the Secretary acknowledges in his regulation that "review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of" . . . potentially dangerous conditions. 29 C.F.R. § 1977.12(b)(1). Nevertheless, the regulation goes on to state, in the provision here in dispute, 29 C.F.R. § 1977.12(b)(2):

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[6] The Secretary has instructed that "[e]xcept in extraordinary circumstances, any inspection [in response to an imminent danger allegation] should be conducted within 24 hours of receipt of the allegation." OSHA *Field Operations Manual*, 1 CCH Employment Safety and Health Guide, § 4370.3 (Jan. 1979).

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The Secretary has thus concluded that, under the facts he has laid out in the regulation, employees do have the right to refuse to work. The inconsistency of this conclusion with the express provisions of the Act is patent. Indeed, the foregoing enumeration of the rights created in the Act makes it clear that the Act deliberately withholds from the employee the right to make the determination that a dangerous situation *may* in fact exist. The Act gives that right *in the first instance* only to the inspector and through the inspector to the Secretary of Labor. And the foregoing enumeration makes it manifestly clear that the employee does not have the right to make the *final* determination that a dangerous situation *does* in fact exist and that business operations must therefore be halted—by his walkout. The Act withholds that right—that power—from even the inspectors and the Secretary himself, and gives it only to the federal courts. The absence of an employee right to walk off the job is

carefully balanced in the Act by the presence of the provisions which directly involve the employee in every respect of the Act's administration, and explicitly protect an employee who "institutes or caused to be instituted" any proceeding under the Act, including the provision which makes the employee the one who sets in motion the Act's imminent danger procedure.

In applying an analysis similar to the foregoing, the Fifth Circuit agreed with the Secretary's analysis and found that nothing in the Act created or authorized the implied right granted in the regulation. *Marshall* v. *Daniel Construction Co., Inc.*, 563 F.2d 707 (C.A. 5 1977), *cert. den.* —— U.S. —— (No. 77-1697, 1978); *accord*, *Marshall* v. *Certified Welding Corp.*, —— F.2d ——, No. 772048 (C.A. 10 1978). In direct contradiction, the lower court determined that the regulation creating the right was a proper exercise of the Secretary's authority. *Whirlpool* v. *Marshall*, 593 F.2d 715 (C.A. 6 1974).

Significantly, the lower court does not disagree with the conclusion of the other circuit courts that there is no express right granted in the Act from which the implied right logically flows. Rather, the lower court relies on the broad policy of the Act, which the court then terms a "right", and declares that the Secretary's regulation is consistent with this policy, and thus permits through administrative fiat what was legislatively denied.[7] In so

[7] *Id.* at 722. The lower court's construction of the Act's broad policy is apparently based on the dissenting opinion in *Daniel, supra* at 718, wherein it was noted that the regulation "can be interpreted as embodying one of the 'other rights' mentioned in 11(c)(1) [29 U.S.C. § 660(c)(1)], a right to safe conditions implicit in the entire law." But the dissent's use of quotation marks around the phrase "other rights" is puzzling since that phrase does not appear at all in 29 U.S.C. § 660(c)(1). This provision protects an employee who exercises "on behalf of himself or others . . . any right afforded by this Act."

doing, it cannot be disputed that the lower court has dramatically expanded the careful scheme of the Act's request for inspection and imminent danger provisions, the end result being that employees, not federal judges, would have the power to suspend operations, a result the Act clearly rejects. Such a result cannot be found by implication within the four corners of the Act without a total disruption of its carefully constructed scheme. Thus, the lower court's holding completely ignores this Court's admonition that the duty of the judiciary in construing legislation is to examine the words employed by Congress ". . . to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More Or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951).

Indeed, mere reliance on general policy is insufficient to imply a right in an otherwise explicit, comprehensive scheme. As the District of Columbia Circuit Court noted, in rejecting an argument that this Act's overall policy could support an implied right:

> Although many arguments could be addressed *to Congress* advocating that [the right] be granted . . . these policy arguments cannot serve as a basis for judicial supplementation of the expansive statutory scheme. (Emphasis added).

Leone v. *Mobil Oil Corp.*, 523 F.2d 1153, 1161 (C.A.D.C. 1975).

Equally significant, the lower court clearly misconstrued and misapplied the basic rule of statutory construction cogently set forth by this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974):[8]

[8] See, also, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61-62 (1978); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942).

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U.S. 282, 289, 73 L Ed 379, 49 S Ct 129 (1929). This principle of statutory construction reflects an ancient maxim-expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. Accordingly, we turn to the legislative history of § 307(a).

Applying this rule of statutory construction to the scheme of rights and procedures reviewed above, it is evident that the Act affirmatively describes the rights and powers of employees, the Secretary and the federal courts in situations involving danger in the workplace. The employee requests an inspection, the Secretary, if he so determines, brings the situation to the attention of the federal court, and the court may order immediate withdrawal of employees and suspend operations if necessary. The Act clearly limits the procedure in imminent danger situations to be done in this particular way. The Act withholds from anyone except the courts the right to determine that such a situation exists in fact, warranting such a remedy, and expressly provides the employee with the protected right to set in motion—"to institute or cause to be instituted"—the imminent danger procedure. Accordingly, under the "expressio unius est exclusio alterius" rule, it must be concluded that the Act denies

employees the right to determine that an imminent danger exists and denies them the power to suspend operations through self-help without resorting to the expressly established statutory procedure. In light of this rule, it is respectfully submitted that the court below erred in finding the existence of such an implied right and expanding the Act to subsume such a self-help remedy, unless the court could point to clear evidence of legislative intent to the contrary.

B. The Legislative History Contains No Evidence of Legislative Intent Implying the Right Created By the Secretary's Regulation.

As the Secretary's regulation acknowledges (29 C.F.R. § 1977.12(b)(1), *supra*) nothing in the legislative history suggests that employees should have the right to refuse to work and suspend business operations. Nothing in the decision below contradicts this admission. Rather, the lower court, applying a perverse interpretation of this Court's clearly enumerated rule of statutory construction, concluded that the pertinent legislative history on rights and procedures in imminent danger situations is irrelevant; concluded that Congress never addressed the question of employee rights, and concluded that the legislative history of a subsequent related statute indicates that Congress would have created the right if the issue had been addressed. *Whirlpool*, *supra*, 593 F.2d at 730, 733-736. It is submitted that in reaching these conclusions the lower court erred.

The legislative history of the Act discloses two series of events in which Congress expressly considered the rights and procedures applicable to imminent danger situations.[9] In fact, during the arduous process which cul-

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[9] The legislative history of the Act is found in Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History on the Occupational Safety and

minated in the passage of the Act, both the Senate and the House rejected proposals which would have given employees the right to refuse to work in the face of unsafe conditions, and both agreed instead on the provisions giving employees the right to request a special inspection and trigger the procedure for imminent danger situations.

In the House, this debate took place over two bills; one introduced by Representative Daniels and subsequently reported out of the Committee on Education and Labor, and one introduced by Representative Steiger as an amendment, in the nature of a substitute. Leg. Hist. at 721, 763, 831. In the reported Daniels bill, the Secretary's inspector was authorized to issue shut-down orders of five days duration, with the courts being empowered to extend this time if necessary. Leg. Hist. at 955-57. The minority members of the Committee viewed this provision with alarm, expressing a fear of the "great potential for misuse that would be created if this power were put in the hands of an inspector in the field" who could become "a pawn in labor disputes" subject to pressure "to shut down plants in cases other than *bona fide* imminent danger situations." Leg. Hist. at 885-87. Their view, which ultimately prevailed, was to repose such power exclusively in the federal courts. The reported bill also contained a controversial provision which would have given employees the right to leave a workplace with no earnings loss under certain circumstances, even if no imminent danger were present, and even if no inspection had been made. Leg. Hist. at 969-70. This provision became known as the "strike with pay" provision. The Committee justified this provision by saying that "[t]here is still a real danger that an employee may be economically coerced into self-exposure in order to

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Health Act of 1970 (Committee Print June, 1971), referred to in this brief as "Leg. Hist.". The Senate report and the Senate-House Conference report are also found in U.S. Code Cong. & Admin. News, 91st Cong., 2d Sess. 5177-5241 (1970).

earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay." Leg. Hist. at 860. The Steiger bill subsequently introduced contained no provision permitting employees to walk off the job under any circumstances, and granted to federal courts the power to issue withdrawal and suspension of operation orders. Leg. Hist. at 796-98. Later in the debates Representative Daniels recognized that House sentiment was leaning in favor of the Steiger bill, and offered amendments to his own bill in order "to alleviate fears that have been expressed [and] that while not interfering with its effectiveness, will reduce areas of concern . . ." Leg. Hist. at 1004. With respect to the pertinent issue here, he described his amendments as follows (Leg. Hist. at 1071):

> Second, in imminent danger situations, the Secretary will now be required to get judicial relief. We have eliminated the provision under which a plant could be closed by an administrative order.
>
> *Third, we have deleted a provision which was—though inaccurately—called a "strike with pay" provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace.* (Emphasis added).

In justifying these amendments, he inserted in the Congressional Record the following (Leg. Hist. at 1008-1009):

> This amendment is a substitute for the provision in section 19 of the committee bill permitting employees to absent themselves from dangerous situations without loss of pay. When we get to Section 19 I will offer an amendment to delete that provision.
>
> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm;

> instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. *Instead of making provisions for employees when their employer is not providing a safe work place, we have strengthened the enforcement by this amendment provision and tried to minimize the amount that employees will be subject to the risk of harm.* (Emphasis added).

Nevertheless, the House passed the Steiger bill which never contained a provision permitting employees to withdraw from the workplace and suspend business operations.

In the Senate, debate focused on the distinctions between a bill sponsored by Senator Williams and reported out by the Committee (Leg. Hist. at 141, 204) and one proposed by Senator Dominick which was identical to the Steiger bill. Leg. Hist. at 73. The Committee bill was similar to the Daniels bills, albeit somewhat more restrictive, in that it would have required the Secretary to obtain a federal court order to suspend business operations and withdraw employees, unless there was insufficient time to obtain such an order in which case the inspector, after obtaining concurrence of a regional Labor Department official, could issue a suspension order of three days duration. Leg. Hist. at 153, 362-64. But, the reported Williams bill did not contain any provision permitting employees to walk off the job with pay, in contrast to the Daniels bill. Instead, the Williams bill contained a request for inspection provision, almost identical to the Act's present provision, which specifically created an employee right to request a special inspection if imminent danger were believed to be present, and which required the Secretary to honor such a request if based on reasonable grounds. Leg. Hist. at 252-53. Significantly, this scheme was created by design and not by neglect, for the Committee had considered giving employees a right similar to that contained in the Daniels

bill, but rejected the idea in favor of the request for inspection procedure. As explained by Senator Williams (Leg. Hist. at 416):

> . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

Subsequently, Senator Williams described the distinctions which he felt made his bill preferable to the Dominick bill (Leg. Hist. at 432-33):

> The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled. . . .
>
> The Committee bill provides that in imminent danger situations *the Secretary may bring action* in the appropriate U.S. district court for a temporary restraining order or an injunction requiring steps to be taken to correct, remove, or avoid the danger, *and prohibiting the presence of individuals where the imminent danger exists.*
>
> * * * *
>
> The committee bill also permits *the Secretary*, if he determines that the danger of death or serious harm is so immediate that action must be taken

without awaiting the institution of court proceedings, *to order such action to be taken and his order may remain in effect for 72 hours.*

This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute proposed. These are the true emergency situations where time manifestly is of the essence. (Emphasis added).[10]

The Senate passed the Williams bill (Leg. Hist. at 450) but in the Conference Committee the House provision giving the federal courts exclusive power to issue suspension and withdrawal orders was agreed to in conjunction with the Senate provision creating an express employee right to request a special inspection and trigger the imminent danger procedures.

As the foregoing review of the Act's legislative history demonstrates, both houses of Congress considered specific provisions dealing with employee rights and procedures to be followed in imminent danger situations. Nothing in this history provides *any* evidence contrary to the conclusion that Congress intended for the provisions of the Act to be the exclusive means of dealing with such situations. Rather, the "wholesale rejection" of the provision permitting employees to walk off with pay, and the granting to federal courts the authority to suspend business operations, demonstrate an "overriding concern of Congress" to avoid "unnecessary confrontations between employer and employees." *Daniel Construction, supra,* 563 F.2d at 714. The two criteria relied on by the lower court to dismiss this legislative intent are wholly without foundation.

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[10] The lower court's conclusion that these remarks, in context, demonstrate the consistency of the Secretary's regulation simply is not supportable. 593 F.2d at 733, note 44. There is nothing in the statement to indicate that Senator Williams, in making his comparison to the Dominick bill, ever contemplated an employee right to walk off the job. Indeed, neither bill contained such a provision.

First, the lower court dismissed this legislative history as irrelevant on the grounds that the debate focused on the "with pay" aspect of the proposed right, whereas the Secretary's regulation does not contemplate pay if an employee, with no reasonable alternative, walks off the job. *Whirlpool, supra,* 593 F.2d at 730-31. This begs the obvious question for, if that were the only concern, Congress was certainly capable of writing a similar provision in a more limited fashion. Moreover, this contention is not entirely accurate for, as the Committee Report accompanying the Daniels bill explained, the "earnings protion" meant that an employer could assign an employee to other work, at no loss in pay, during the duration of the hazardous condition, but would not have to pay for work not performed. Leg. Hist. at 860. This interpretation of the rejected provision is virtually identical to the construction given the Secretary's regulation. Finally, the lower court failed to acknowledge a prior action by the Secretary in which he determined that the Act's anti-discrimination provision requires employees to be paid for exercising their right to accompany an inspector during an inspection. 42 Fed. Reg. 47344, amending 29 C.F.R. § 1977.21 (September 20, 1977). This interpretation, which has recently been upheld by a district court,[11] is a complete reversal of the previous position taken by the Secretary, which held that such time was non-work activity and hence not compensable. 38 Fed. Reg. 2681 (January 29, 1973). Thus, the conclusion reached by the lower court is in direct contradiction to the interpretation of the anti-discrimination provision adopted by the Secretary. Indeed, the Secretary's rationale, that "failure to pay an employee for time spent during the walkaround will have a strong chilling effect on an employee's willingness to act as representative

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[11] See, *U.S. Chamber of Commerce* v. *OSHA,* —— F.Supp. ——, No. 77-1842 (D.C.D.C. 1979), appeal pending, No. 78-2221 (C.A. D.C.). But see, *Leone* v. *Mobil Oil Corp., supra,* 523 F.2d 1153.

of employees . . ." (42 Fed. Reg. 47344), must necessarily apply with equal force to the implied right created in his regulation, for the denial of pay to an employee who exercises that right must likewise have a similar "chilling effect". Thus, the lower court's decision does, in fact, set up the potential for a "strike with pay" which Congress expressly rejected.

The lower court's second basis for dismissing the Act's legislative history is based on its examination of the subsequent legislative history of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, amending the Federal Coal Mine Safety and Health Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). *Whirlpool, supra*, 593 F.2d at 735-36. Specifically, the court noted that in amending the 1969 Act's anti-discrimination provision, which was the precursor of 29 U.S.C. § 660 (c) (1), the Congress in 1977 specifically indicated that the amended provision, 30 U.S.C. § 815(c) (1), should be construed to afford miners the right to refuse to work in the face of imminent dangers. *Id.* at 735. The court subsequently concluded that Congress could not have intended otherwise under this Act. But this chain of events supports a conclusion directly opposite that reached below. As this Court noted in *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U.S. 361, 365-66 (1950), the action or inaction of a subsequent Congress is relevant to the question whether Congress is satisfied that a law is being properly interpreted and applied. Thus, the subsequent *action* by Congress in 1977, including the same congressional committees that reported out the 1970 OSH Act, indicates its belief that the 1969 Act, whose anti-discrimination provision closely parallels 29 U.S.C. § 660(c) (1), did *not* authorize such a right, and its *inaction*, again *the same congressional committees*, in similarly amending or even mentioning OSHA is compelling evidence that no such right was intended under the Act. Similarly, the specific congressional reference

of an intent to overrule an administrative decision under the 1969 Act,[12] with no such reference by Congress to federal court decisions adverse to the Secretary's regulation here in issue[13] is further evidence that Congress had no intention of implying a similar right under the Act.

Thus, this is not a situation in which "the courts must . . . in effect, consider what answer the legislature would have made as to a problem that was neither discussed or contemplated." *Whirlpool, supra* at 735, quoting *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 380 (C.A.D.C. 1973), *cert. den.*, 417 U.S. 91. As demonstrated, the issue was thoroughly discussed and a solution reached. But even assuming, *arguendo*, that the court's contention is correct, the following observation subsequently made by the District of Columbia Circuit in considering a similar issue under the Act is more appropriate (*Leone* v. *Mobil Oil Corp., supra*, 523 F.2d at 1161):

> . . . This lack of acknowledgement of the issue may indicate that Congress did not *consider the problem* at the time OSHA was adopted. Whether Congress deliberately or *unconsciously omitted* provisions . . . for employees, however, the questions *remains one properly reserved to the legislative process.* We are particularly unwilling to supply this policy decision where Congress has evidenced as a continuing interest in the legislation and where the statute provides a method of bringing such problems before Congress through the efforts of the Secretary of Labor. (Footnote omitted). (Emphasis added).

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[12] *Whirlpool, supra* at 736.

[13] The decisions of the federal district courts in *Daniel Construction*, and *Whirlpool* were rendered in 1976. See, e.g., 416 F.Supp. 30 (N.D. Ohio 1976).

C. The Secretary's Regulation is Inimical to the Act's Statutory Scheme and is Unnecessary to Protect Employees From Imminent Danger.

As demonstrated in the foregoing analysis, the arguments advanced by the lower court do not suffice as a basis for amendment of the Act by administrative dictate. The analytical method developed by this Court to determine if an implied right exists requires close examination of the scheme of the statute, its legislative history and the effect such a right would have on the scheme established by Congress to accomplish the purpose of the statute. *SIPC* v. *Barbour*, *supra*, 421 U.S. at 419-21; *Cort* v. *Ash*, *supra*, 422 U.S. at 78. In these cases, this Court denied a claim to an implied right of action because such action might disrupt the scheme established by Congress to achieve its legislative purpose, *and* because there was no evidence of legislative intent to permit such action. Applying this method to the regulation here in issue, it is submitted that the lower court erred in upholding the implied right created by the Secretary.

There is no argument that the broad general purpose of the Act is to assure employees safe and healthful working conditions, and that a more specific purpose is to assure employees protection from exposure to the risk of serious physical harm and imminent danger. 29 U.S.C. §§ 651(b), 657(f)(1); 662(a). But it is equally clear that the Act encourages employers and employees to work together toward reducing safety and health hazards in the workplace and, more specifically, assures that swift but orderly and objective procedures are followed in situations involving such risks; to which end the authority to determine that a cessation of business operations is necessary because of hazardous conditions is lodged exclusively in the judiciary. This carefully worked out statutory scheme is compelling evidence that Congress did not intend, indeed went to great pains to specifically avoid,

putting employers and employees in an adversarial relationship under the Act. It is evident, however, that the Secretary's regulation would frustrate this Congressional purpose, for it can only encourage numerous disputes between conflicting, albeit "good faith" beliefs over whether or not such walkouts are justified; no doubt many of these disputes would end up in federal court. In short, the orderly and objective scheme of the Act and its specific purposes cannot be reconciled with the implied right sought herein.

Yet the lower court upheld the implication of this right on the grounds that it filled a gap in employee protection; that it eliminated putting an employee in the position of choosing between his or her job and his or her safety. This observation suggests, of course, that employers would force employees into making such a choice, and it is strongly submitted that such a contention is unwarranted. Congress itself refused to make this assumption, for there was no disagreement when it was noted that an employer informed of an apparent hazardous condition would "99 times out of 100" seek to ascertain and ultimately correct it.[14] By establishing the procedures it did, Congress thus determined that an employer's decision to continue work must be accorded "good faith".[15] And where Congress has given employers the benefit of the doubt, the courts should do likewise.

Where a "good faith" disagreement exists, then resort to the statutory procedure is available, and is clearly protected activity. In fact, the Act's already existing provisions are designed so that an employee need never face the choice perceived by the court below. To demonstrate this, one need only examine the interpretation given the

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[14] See, 116 Cong. Rec. 38,367-368; 116 Cong. Rec. 37,237-346 (1970).

[15] See, e.g., *Daniel Construction*, *supra*, 563 F.2d at 716, note 21.

Act's anti-discrimination provision by the courts, and the Secretary's procedure for dealing with imminent danger allegations.

The courts have interpreted the Act's anti-discrimination provision broadly, concluding that an employee's participation in protected activity need not be the sole consideration behind discharge or other discriminatory action by an employer. If the discrimination would not have taken place "but for" the protected activity, or the activity is a substantial reason for the discrimination, then 29 U.S.C. § 660(c)(1) has been violated.[16] 29 C.F.R. 1977.6 (b). The case of *Dunlop* v. *Trumbull Asphalt Co., supra,* is a good example of the court's willingness to find the protected activity as the motivation behind discriminatory action. There the court found that an employee who initiated a complaint pursuant to 29 U.S.C. § 657 and who also engaged in a work stoppage was discharged for filing the complaint and not for the absence which followed, and was therefore discriminated against in violation of the Act.

Turning to the Secretary's procedure for handling imminent danger complaints,[17] he has accorded such allegations the "highest priority", the expedited and thorough handling of which must not be interfered with by other considerations. The evaluation of the allegation, whatever its form, is to be accomplished "immediately" and an inspection conducted within twenty-four hours. In addition, the Secretary's representative is to contact the employer "immediately" upon receipt of the allegation, ascertain the facts, attempt to have any affected em-

[16] See, e.g., *Dunlop* v. *Trumbull Asphalt Co.*, —— F.Supp. ——, No. 75-1025, 4 OSHC 1847 (E.D. Mich. 1976); *Dunlop* v. *Hanover Shoe Farms, Inc.*, —— F.Supp. ——, No. 75-1243, 4 OSHC 1241 (M.D. Pa. 1976).

[17] U.S. Dept. of Labor, *Field Operations Manual*, Ch. IX, reprinted in 1 CCH ESHG ¶ 4370.2 (January 1979).

ployees voluntarily removed, and determine the steps the employer intends to initiate to eliminate the danger.

Taken together, the above demonstrates that the Act already provides ample protection for employees. If an employee believes an imminent danger exists, he has an absolute right to "institute or cause to be instituted" any proceeding under the Act; in this case the imminent danger procedure. An employer who discriminates against the employee while he or she is in the process of, or subsequent to, the exercise of that right would have to overcome the "but for" test developed by the courts. In addition, the Secretary will become involved in the matter quickly, and the employer will be informed of that involvement. An employer must then be willing to risk the severe penalties associated with a willful violation of the Act[18] if he takes no action to protect his employees. Thus, the statutory scheme provides ample protection yet permits an orderly and objective determination of the situation.

Surely, this procedure is preferable to the potential for disputes and litigation inherent in the Secretary's regulation. With so many subjective judgements to be made, i.e., whether there is a "good faith" belief about the situation; what is "insufficient time" to invoke the normal statutory procedure, what constitutes a "reasonable alternative" to walking off the job, the potential for abuse is obvious. Indeed, this Court itself was concerned about the problems inherent in such subjectivity when, in *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 386 (1974), it was noted that "[i]f the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of workers."

[18] What constitutes a "willful" violation, and the penalties associated with such a violation are discussed *supra* at 7.

Congress clearly sought to eliminate such "wholly speculative inquiry" by placing with the courts the authority to determine, in fact, that a dangerous situation exists, and empowering the courts to take any appropriate action. But Congress also clearly sought to protect employees by giving them the express right to institute the procedures leading to the court's determination. The Secretary's regulation all but eviscerates the carefully enacted scheme. Accordingly, the decision of the lower court should be reversed.

II. THE SECRETARY'S REGULATION IMPROPERLY INTERFERES WITH WELL SETTLED NATIONAL LABOR POLICY.

That Congress did not intend to give the Secretary authority to create the right established by his regulation is further confirmed by the fact that the regulation is highly disruptive of labor-management relations. By imposing through administrative fiat what parties are required to negotiate, the Secretary has improperly intruded into the area of collective bargaining.

Although safety and health regulations are not necessarily invalid merely because they may affect matters which also are, or could be, the subject of negotiations between management and labor, the Secretary, lacking explicit authority in this area, cannot infer an implied right or power in a manner which does violence to well established national labor policy.[19] That policy is "to encourage the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife,"

[19] Indeed, the Third Circuit has held that the issues of payment for personal protective equipment and the sanctioning of noncomplying employees are not within, or subsumed by, the Act's mandate but are exclusively within the province of collective bargaining. *Budd Co.* v. *OSHRC*, 513 F.2d 201 (C.A. 3 1975); *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC, supra*, 543 F.2d 541.

without concerning the government with "the substantive terms upon which the parties agreed." *Local 24* v. *Oliver*, 358 U.S. 283, 285 (1959). The Secretary and the lower court have ignored that policy.

Safety and health matters have long been recognized as mandatory, hardcore subjects of collective bargaining, *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), and safety disputes are proper subjects for arbitration. *Gateway Coal Co.* v. *United Mine Workers, supra*, 414 U.S. 368.[20] If Congress had intended to authorize the Secretary to remove these traditionally bargainable subjects from the collective bargaining table and to dictate their treatment as a matter of law, it would have done so explicitly. When, as here, the Secretary has no express authority to regulate the subject, and when, as here, the subject is a mandatory topic of collective bargaining, then a proper balancing of the policies of the Act and the National Labor Relations Act (29 U.S.C. §§ 141, *et seq.*, hereafter NLRA) requires the Secretary and the courts to leave such matters to the collective bargaining process. See, *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). By not carefully balancing these two policies, and by relying on the Act's broad general policy to uphold the regulation, the lower court has virtually granted the Secretary carte blanche to promulgate, as amendments to the NLRA, any regulation which is arguably consistent with that broad policy. However, as has been suggested:

> A much more cautious approach to implied amendments of the NLRA is required if the Court is to give proper effect to the legislative judgments of the Con-

[20] In one study, safety and health provisions were found in over 80 percent of collective bargaining agreements. See, *Basic Patterns: Working Conditions—Safety and Health* (BNA 1979); see, also, Davis, *Union Contract Language With Teeth*, 35 Guild Practioner 61 (1978).

> gress. Having once resolved the balance to be struck in the collective-bargaining relationship, and having embodied that balance in the NLRA, Congress should not be expected by the Court to reaffirm the balance explicitly each time it later enacts legislation that may touch in some way on the collective bargaining relationship. Absent explicit modification of the NLRA, or clear inconsistency between the terms of the NLRA and a subsequent statute, the Court should assume that Congress intended to leave the NLRA unaltered. (Footnote omitted).

New York Telephone Co. v. *New York Labor Dept.*, —— U.S. ——, 59 L.Ed. 2d 553, 585 (1979) (Powell, J. dissenting).

It is submitted that the Secretary's regulation thrusts both him and the Act into the field of labor-management relations thereby defeating the express Congressional intent to "achieve coordination" between the Act and "other federal laws", and to avoid "duplication". 29 U.S.C. § 653(b)(3). Indeed, if upheld, this regulation can, at best, only cause additional confusion in a field that has been a source of conflict in labor-management relations; the enforcement of the no strike-no lockout and arbitration provisions of collective bargaining agreements. Moreover, the obvious possibility of duplicative litigation in different forums with inconsistent results,[21] may lead to omitting safety disputes from collective bargaining agreements entirely, or specifically excluding them from arbitration; a result in direct conflict with this Court's interpretation of national labor policy. The following analysis illustrates the problem.

Subsumed in an employee's right under section 7, 29 U.S.C. § 157, of the NLRA to strike, engage in collective

[21] In *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), this court counselled against a "multiplicity of tribunals" to avoid producing "incompatible or conflicting adjudications". *Id.* at 490-91.

bargaining and other concerted activity is the right to engage in such activity over safety matters. As confirmed by this Court in *NLRB* v. *Washington Alumnium Co.*, 370 U.S. 9 (1962), section 7 protects strikes to protest unsafe working conditions so long as there is a good faith belief that such conditions exist. The National Labor Relations Board (NLRB) has continually affirmed this right, broadening the concept of concertedness to apply to a single employee's efforts to secure compliance with job safety laws. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).[22] This belies any notion that employees are faced with a "Hobsons choice" between jobs and safety, but more importantly it means that courts, in deciding cases brought by the Secretary under his regulation, will be intruding into areas of labor law previously thought to be within the exclusive province of the NLRB. See, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959).

More important, an employer can protect itself against work stoppages over safety disputes by negotiating a no-strike provision into its collective bargaining agreement, thereby making such stoppages during the term of the agreement unprotected activity subject to disciplinary action, including discharge. *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939). Further, if the safety dispute is subject to a contractual grievance procedure culminating in a final and binding award, an employer may enjoin the work stoppage over the dispute by resorting to the procedures contained in section 301 of the NLRA, 29 U.S.C. § 186. *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970); *Gateway Coal Co.* v. *United*

[22] *Accord, Jim Causley Pontiac*, 232 NLRB 37 (1977); *B & P Motor Express, Inc.*, 230 NLRB 96 (1977). *See*, also, *Welco Industries Inc.*, 237 NLRB 46 (1978).

Mine Workers, supra; Cf. *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1978).

There is, however, an exception to the section 301 strike insulation, set forth in section 502 of NLRA, 29 U.S.C. § 143, which provides, in pertinent part:

> . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

As its language suggests, this provision allows employees to strike in protest over safety conditions regardless of a contractual no-strike commitment, because a safety strike over "abnormally dangerous conditions" is not a strike under the NLRA. However, in *Gateway Coal, supra,* at 387, this Court required that to establish a section 502 defense to a *Boys Markets* injunction "ascertainable, objective evidence" must be presented to support the conclusion that an "abnormally dangerous condition for work exists". Without such evidence, an employee's subjective, albeit good faith determination that such conditions exist does not alone justify a refusal to work, and such refusal would be in violation of the no strike clause and unprotected under the NLRA. Discipline in such cases can, due to emotions involved, precipitate even broader work stoppages, but may be necessary to enforce the no-strike clause, and thus maintain the vitality of its *quid pro quo;* the agreement to submit such disputes to arbitration.

However, the Secretary's regulation has effectively eliminated this framework, without any express intention of Congress to modify section 502 or the enforceability of collective bargaining agreements. In fact, there is no express provision in the Act, equivalent to section 502, which treats a work stoppage over a safety dispute as anything other than a strike, nor does the legislative history indicate that a refusal to work over safety conditions is not a strike, or is otherwise permitted. Thus, there is nothing in the Act which creates an exception to a no-strike pledge or to an agreement that safety disputes be arbitrated. But, if, as the lower court contends, the Act implies a right to refuse to work in certain circumstances then, to the extent that such a right exists, a work stoppage under the Act would be outside the scope of a no-strike obligation and would not be subject to injunctive relief.

Moreover, "imminent danger" as defined in 29 U.S.C. § 662(a), *supra,* and as interpreted in the Secretary's regulation, is hardly synonomous, with "abnormally dangerous conditions". Indeed, a job may be inherently dangerous, although not abnormally so under section 502, and therefore outside its protection.[23] Yet the same job may constitute a "real danger" under the Secretary's regulation, which does not require "ascertainable, objective evidence" but only a subjective good faith belief that such a condition exists. *Gateway Coal, supra.* Accordingly, wholly apart from injunctive relief, if employees have an implied right under the Act to refuse to work in "imminent danger" situations then, to that extent, a no-strike pledge may be violated with impugnity for there would be no method to enforce the requirement to arbitrate.

Thus, the Secretary's regulation has created an exception to section 301 relief where employees cannot satisfy the section 502 criteria but fall within the implied right created, and has vitiated the ability to enforce binding arbitration. Such a situation "presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful reso-

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[23] *Philadelphia Marine Trade Association* v. *NLRB,* 330 F.2d 492 (C.A. 3 1964), *cert. den.,* 379 U.S. 841 (1964).

lution of labor disputes . . ." *Boys Markets, supra,* 398 U.S. at 253.

Accordingly, because the court below failed to recognize the serious implications of the regulation on labor-management relations, its decision is in error.

CONCLUSION

For the reasons set forth above, and those in the Petitioner's brief, it is respectfully requested that the judgment of the lower court be reversed.

Respectfully submitted,

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I hereby certify that the requisite number of copies of the foregoing brief *Amicus Curiae* were served on this 15 day of November, 1979, by depositing same in the mail, postage prepaid, certified mail, addressed to the following:

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